

CONFIDENTIAL

ROUTING AND RECORD SHEET

RECEIVED

SUBJECT: (Optional)

H.R. 987

FROM:

ALD/OGC

EXTENSION

NO.

Ref: OGC-87-51605

DATE

1 June 1987

TO: (Officer designation, room number, and building)

DATE

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OFFICER'S INITIALS

COMMENTS (Number each comment to show from whom to whom. Draw a line across column after each comment.)

1. Legislation Div/OCA
7B14 HDQS

Our bottom-line recommendation, which is not stated in the attached memorandum but is derived from all of the considerations it discusses, is that the Agency should avoid taking either a "pro" or a "con" position on the bill or State's letter and should keep out of the discussion/debate on the issue(s) presented by those items. If a simple non-response is not feasible, then a "no comments" might be appropriate. If OMB still pressed for a substantive position or explanation, we might indicate that the bill addresses title 5 authorities which by their terms would not apply to us or directly affect Agency employees' entitlements.

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(7 Apr 1987)

OGC-87-51605
1 June 1987

MEMORANDUM FOR:

Legislation Division
Office of Congressional Affairs

THROUGH:

Chief, Administrative Law Division/OGC: *W*

FROM:

Assistant General Counsel
Administrative Law Division/OGC

SUBJECT:

Proposed Department of State Views Letter
on H.R. 987, "A bill to amend title 5,
United States Code, to liberalize certain
provisions authorizing reimbursement for
expenses of sale and purchase of a residence
upon the transfer of a federal employee" (U)

1. You have asked for our comments regarding the above-noted views letter and legislation. (U)

2. H.R. 987 would expand the reimbursement available to executive agency employees generally for home sale or purchase transaction (or leasebreaking) expenses incident to official transfer from one permanent duty station to a new permanent duty station. Under the current generally applicable government-wide statutory provision relating to such reimbursement, 5 U.S.C. § 5724a(a)(4), reimbursement for residence transaction expenses may be authorized only when the employee is transferred from a permanent duty station in the United States or a nonforeign area (i.e., U.S. territories or possessions, Puerto Rico, or the Panama Canal "zone") to another permanent duty station in the United States or a nonforeign area. H.R. 987, if enacted, would authorize reimbursement of the expenses of selling a residence (or breaking a lease) "at the official station [in the United States or a nonforeign area, presumably] from which the employee was transferred when . . . assigned to a post of duty . . . outside the United States [or a nonforeign area]." (Emphasis added). Additionally, H.R. 987 would authorize reimbursement for the expenses of buying a residence at a new official station when

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an employee is transferred from a post of duty outside the United States or a nonforeign area to a post of duty in the U.S. or such an area, except where the U.S./nonforeign duty post is the same one from which the employee was transferred to the foreign station. These new reimbursement authorities would be applicable to transfers on or after 1 January 1979. (U)

3. The State Department's draft views letter apparently opposes H.R. 987 mainly on the grounds that because the government already provides essentially free housing to employees transferred to foreign posts, such employees are freed of the burden of paying double housing costs which retaining a home in the United States could otherwise entail, and it is therefore not necessary or even equitable to subsidize the expenses of selling the U.S. residence, and/or buying a new U.S. residence upon transfer back to a U.S. post. The Department's views letter also suggests that if H.R. 987 were enacted, the various State Department employee unions would seek to have parallel benefits established pursuant to 5 U.S.C. § 5924(2) and 22 U.S.C. § 4081(14). This Agency, in turn, could "adopt" under section 4(b)(1) of the CIA Act of 1949, as amended, any such benefits as are established. (AIUO)

4. For your background, there would appear to be a basic philosophical and policy disagreement between the Agency's position and the State Department's position on this general issue. In 1983, this Agency, pursuant to the statutory authority granted by section 4(b)(2) of the Central Intelligence Agency Act of 1949, as amended, 50 U.S.C. section 403e(b)(2), and following the required advance notification to the Select Committees on Intelligence, promulgated HR 22-27. That regulation authorizes reimbursement to Agency employees of the expenses of selling a residence (or breaking a lease) at a PCS post in the United States incident to a transfer to a foreign duty post, and the expenses of purchasing a residence at a new duty post in the United States, outside the metropolitan Washington, D.C. area, upon transfer from a foreign duty post. Thus, the Agency already provides much (but not all) of the employee benefit which would become available to executive agency employees generally if H.R. 987 were enacted. It may be presumed that the Agency's policymaking arms would not join or concur in any official statement indicating or suggesting that the reimbursements authorized by HR 22-27 constitute an unnecessary windfall or reflect wrongheaded policy determinations. Enactment of H.R. 987 to a considerable extent would represent a case of the rest of the government "catching up" to the Agency, thereby confirming or corroborating the wisdom and validity and constituting further congressional recognition of the appropriateness of the Agency's 1983 implementation of the benefits in HR 22-27. (C)

5. In several respects, however, H.R. 987 also would represent a case of the rest of the government surpassing the Agency, insofar as the bill would give non-Agency (and non-Foreign Service) employees benefits that Agency employees would not receive under the bill and that Agency employees do not now enjoy even under HR 22-27. H.R. 987 would amend 5 U.S.C. § 5724a(a)(4) by adding several new sentences to the end of that provision, to make reimbursement for specified residence transaction expenses generally available incident to domestic-to-foreign and foreign-to-domestic PCS transfers. Such an amendment of 5 U.S.C. § 5724a would have the effect of authorizing the use of contractor-provided relocation services, including guaranteed home sale programs, for foreign-nonforeign and nonforeign-foreign transfers under 5 U.S.C. § 5724a. Similarly, the additional income taxes incurred by an employee as a result of receiving in-kind relocation services or cash allowances for foreign-nonforeign and nonforeign-foreign relocation under 5 U.S.C. § 5724a would be reimbursed to the employee under a "grossing-up" formula, pursuant to 5 U.S.C. § 5724b. The basic benefits of 5 U.S.C. § 5724a, however, are available "only" to employees for whom the government pays expenses of travel and transportation under 5 U.S.C. § 5724(a). While the Agency does pay its employees' domestic PCS travel and transportation expenses under 5 U.S.C. § 5724(a), and hence may pay its employees' domestic PCS relocation expenses under 5 U.S.C. § 5724a, the Agency pays its employees' overseas PCS travel and transportation expenses under section 4 of the CIA Act of 1949, as amended. Thus, while the Agency under HR 22-27 can reimburse its employees for home sale expenses incident to a domestic-to-foreign PCS transfer and for non-Washington, D.C. home purchase expenses incident to a foreign-to-domestic field PCS transfer, 5 U.S.C. § 5724a as amended by H.R. 987 would not authorize this Agency to offer contractual relocation services or tax reimbursement in connection with such transfers. The Agency would be able to implement those two benefits for domestic-foreign or foreign-domestic PCS transfers only by: invoking section 4(b)(2) of the CIA Act to amend HR 22-27 to such effect; or adding legislative language to ensure that the benefits of 5 U.S.C. § 5724b and 5724c are also applicable to Agency domestic-foreign and foreign-domestic PCS transfers. That employees of other executive agencies generally are eligible for such benefits might strengthen the case under section 4(b)(2) that those benefits are necessary to meet the requirements of intelligence work, given the Agency's need for rotational foreign field staffing and the serious morale and equity problems that would result if the group most deserving of the benefits did not

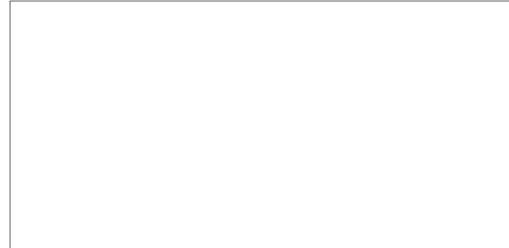
receive them and those less deserving of them did. Section 4(b)(2) does not require that the requirements of intelligence work which necessitate Agency allowances or benefits be unique, but only that they be "distinct among others of a kind." (C)

6. Beyond these general legal and policy observations, we would note one possible technical problem with the bill. The literal language of section 1 of the bill could be read to permit reimbursement of the expenses of selling a residence at one foreign station when an employee is transferred to another foreign station; we are uncertain whether that result is what is really intended. If it is, H.R. 987 would again be extending benefits to non-Agency employees that Agency employees do not currently receive under HR 22-27 and could only be made available to them by one of the two means noted in the preceding paragraph. Also, the provision making the benefits retroactive to 1 January 1979 would be certain to impose an undue administrative burden on agencies, without any solid equitable justification. In general, federal employees who made foreign-domestic or domestic-foreign transfers at any time prior to enactment of H.R. 987 or like legislation had no reasonable expectation and could not reasonably have relied on the prospect of reimbursement for residence transaction expenses incurred incident to such transfers. Opening the government to eight-year-old claims would be inconsistent with the fundamental purposes of the statutes of limitations on claims against the United States. (C)

7. Additionally, there are some problems with certain specific portions of the Department's views letter. The second sentence of paragraph three of that letter could be read for the erroneous proposition that 5 U.S.C. § 5923(2), rather than 5 U.S.C. § 5912, is the general statutory authority for providing free government-provided quarters to employees transferred to foreign posts. Further, we do not understand the substance or the relevance of the fourth paragraph of the letter. That paragraph states that "[a]s the housing expenses of the employee abroad are substantially or fully covered by the United States, the retention of a home in the U.S. is not required by a foreign assignment." Yet elsewhere in the letter, the point is emphasized that such coverage of the foreign housing expenses enables the employee to retain the U.S. home without undue economic burden, thereby obviating any need or equitable reason for the government to subsidize the costs of selling it. Apparently, the Department means the sale of a home in the U.S. is not necessitated by a foreign assignment. Further, the fourth sentence is framed awkwardly, seeming to suggest at least at first glance that one may receive selling expenses for a house that has been retained.

Additionally, employees who make wholly domestic PCS transfers may be reimbursed for residence sale expenses, even though the residence in that situation also has been held until sale for investment and tax deduction purposes (albeit, the housing at the new domestic duty station will not be free to the employee). Finally, as noted above, the problems noted in paragraph six of State's letter would not result for us. (AIUO)

8. We hope the foregoing will be helpful to you in preparing your response to OMB's request. Please bear in mind in framing your answer that the facts that the Agency provides contract relocation services to its employees and has a Domestic Relocation Center supported by a contractor firm is classified CONFIDENTIAL. If you have any questions or comments, please call me on 40410 secure. (C)



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